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MAY 6 1980

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF SAN DIEGO

CINEMATRONICS, INC.,)
a California corporation,)

Plaintiff,)

v.)

VECTORBEAM, a California)
corporation; EXIDY, INCORPORATED,)
a California corporation; and)
DOES I through X, inclusive,)

Defendants.)

No. 451437

SUPPLEMENTAL MEMORANDUM OF
POINTS AND AUTHORITIES IN
SUPPORT OF APPLICATION FOR
PRELIMINARY INJUNCTION

Date: 5/7/80
Time: 1:30 p.m.
Dept: 17

COMES NOW Plaintiff, CINEMATRONICS, INC., who respectfully
submits the following Supplemental Memorandum of Points and
Authorirites in Support of Application for Preliminary
Injunction:

LEGAL ARGUMENT

I

Defendant first attempts to set forth as a defense to
the granting of the preliminary injunction of issue herein
the equitable maxim that "he who comes into equity must come
with clean hands". Such a defense is not favored by the
courts, is reluctantly applied and is scrutinized with a very

1 critical eye. 30 C.J.S. §99 at 1048. Plaintiff is well aware
2 of that oft-repeated maxim, but submits that it stands now
3 before this court with the requisite "clean hands".

4 In support of its assertion that Plaintiff may not
5 turn to this court's equitable jurisdiction, Defendant relies
6 essentially on four alleged circumstances demonstrating
7 Plaintiff's unclean hands:

8 (a) Defendant asserts that Plaintiff's hands are unclean
9 insofar as its own lawyer drafted the agreements now before the
10 court;

11 (b) Defendant asserts that Plaintiff's hands are
12 unclean insofar as it has breached a "stock purchase agreement";

13 (c) Defendant asserts that Plaintiff's hands are unclean
14 insofar as Plaintiff has refused alleged tender of the royalty
15 payments here in question; and

16 (d) Defendant asserts that Plaintiff's hands are unclean
17 insofar as it has filed the instant action despite alleged
18 knowledge of a prior pending action in Santa Clara County.
19 Each of these contentions is without merit and will be examined
20 in further detail below.

21 Plaintiff notes at the outset that the equitable doctrine
22 of unclean hands is not applied to protect the Defendant and
23 has nothing to do with the rights or liabilities of the parties;
24 it is invoked in the interest of the public on grounds of
25 public policy and for the protection of the integrity of the
26 court. Katz v. Karlsson, 84 Cal.App.2d 469, 191 P.2d 541 (1948).
27 Whether the parties are within the application of the doctrine
28 is primarily a question of fact; Fibreboard Paper Products v.

1 East Bay Union, 227 Cal.App.2d 675, 39 Cal.Rptr.64 (1964);
2 Platt v. Wells Fargo Bank, 35 Cal.Rptr.377 (1963) cert.den.
3 377 U.S.965; and there must be some substantive evidence to
4 justify the application of the doctrine by the court. Moss
5 Estate Co. v. Adler, 41 Cal.2d 581, 261 P.2d 732 (1953).
6 Indeed, one court has gone so far as to hold the evidence
7 must be clear, unequivocal and convincing. Schnadig v. Gaines
8 Mfg. Co., 494 F.2d 383 (6th Cir.) (1974). Moreover, public
9 policy may favor nonapplication of the doctrine as well as its
10 application and whenever an inequitable result will be accom-
11 plished by application of the doctrine, the courts reject it.
12 Radich v. Kruly, 226 Cal.App.2d 683, 38 Cal.Rptr.340 (1964);
13 Womack v. Womack, 242 Cal.App.2d 572, 51 Cal.Rptr.668 (1966).

14 In short, the misconduct alleged must be so intimately
15 connected with the injury itself that it would be inequitable
16 to accord the relief sought; Tinney v. Tinney, 211 Cal.App.2d 548,
17 27 Cal.Rptr.239 (1963); and the rule applies as a matter of
18 law, only where the evidence is susceptible of but the one
19 inference that the transaction was entered into with the intent
20 to defraud. Stone v. Lobsein, 112 Cal.App.2d 750, 758, 247 P.2d
21 357 (1952).

22 IA

23 Defendant advances no authority, nor is any extant so
24 far as Defendant is aware, in support of its argument that
25 Plaintiff's hands are unclean as a result of its attorney's
26 drafting of the subject agreement. Defendant boldly asserts
27 that such conduct was "clearly overreaching, fraudulent and in
28 bad faith," and thereupon concludes that such conduct constitutes

1 "unclean hands".

2 In the first instance, the declarations on file herein
3 negate such a conclusion. Would Defendant suggest that
4 Plaintiff prevented it from securing its own attorneys or
5 that the transaction here under examination was not concluded
6 at arms length? Surely not. Defendant seeks solely to
7 establish that, as a matter of law, the drafting of a document
8 ensuring maximum protection for one's client constitutes
9 fraudulent practices evidencing unclean hands. Moreover,
10 even should those allegations be proven, by what doctrine
11 does Defendant seek to show that such actions constitute
12 "unclean hands"? Should that be the case, every contract in
13 common usage would be rendered ineffectual (i.e., leases;
14 installment contracts, etc.) While Defendant may not have
15 been represented by counsel, it need only have read the express
16 language of the contracts to know the effect thereof.

17 Plaintiff submits that Defendant cannot now be heard
18 to complain, for the first time, that its rights were not
19 adequately guarded since it chose not to secure legal advice
20 as to the execution of what apparently amounted to a million-
21 dollar series of contracts.

22 IB

23 Defendant's second contention with respect to the
24 application of the "unclean hands" doctrine rests upon its
25 assertion that equity will not enforce a contract which has
26 been broken by the party seeking equitable relief. While
27 such may be the general rule, Defendant's application of that
28 rule to the "stock purchase agreement" is without legal authority.

1 The suit here under examination is one founded upon the
2 licensing agreement. Plaintiff's verified complaint alleges
3 it has performed under that agreement all that is necessary
4 for it to perform. Defendant has not refuted that allegation.
5 Instead, it seeks to introduce evidence of the breach of another
6 agreement allegedly associated with the same transaction.
7 Plaintiff asserts, of course, that there has been no such
8 breach. Nevertheless, such an alleged breach is not here in
9 issue. Defendant cites Harrison v. Woodward, 11 Cal.App. 15
10 (1909) in support of the proposition that a contract somehow
11 connected with the transaction in question is relevant, but
12 no such holding can be gleaned therefrom. With all due respect,
13 Harrison does not even imply such a finding nor is it even
14 tangentially related to the issues now before the court.

15 IC

16 Defendant next asserts that Plaintiff's refusal of the
17 allegedly tendered royalty payments constitutes "unclean
18 hands". No authority is cited for such a proposition nor is
19 any extant.

20 First, while Defendant may have tendered such payments,
21 no showing is made that they were accompanied by an accounting
22 as required under the licensing agreement.

23 Secondly, said tendered payments, by Defendant's own
24 admission, were made conditioned upon the execution by
25 Plaintiff of a subordination agreement. The licensing agreement
26 here under review provided for no such contingent payments
27 with or without an accounting. The licensing agreement
28 provided only for the payment of royalties together with an

1 accounting. Even the stock purchase agreement upon which
2 Defendant seeks to rely did not require the execution of any
3 subordination agreements only the granting of that right
4 which Defendant does not contest.

5 In short, while royalty payments may have been tendered,
6 they were tendered not in accordance with the agreement.
7 Plaintiff therefore rejected that tender properly in fear of
8 a subsequent assertion by Defendant that the acceptance
9 constituted a waiver of the other breached. Moreover, even
10 assuming arguendo that said tender was valid, by what stretch
11 of the imagination does Defendant hope to establish that such
12 a rightful refusal constitutes "unclean hands" so as to bar
13 Plaintiff from its only effective remedy?

14 ID

15 Finally, Defendant attempts to show this court that
16 Plaintiff acted in the face of a pending Santa Clara action.
17 No showing is made that Plaintiff was even aware of that
18 action, let alone that it acted in the face of it, nor that if
19 it was, that such conduct constitutes unclean hands.

20 Defendant's final basis upon which it hopes to establish
21 unclean hands is, therefore, likewise without merit.

22 II

23 As its second defense to the issuance of a preliminary injunction
24 herein Defendant rests upon its assertion that it is entitled
25 to a set-off against any recovery by Plaintiff by virtue of
26 many and varied breaches of a separate agreement by Plaintiff.

27 Defendant has thereby realized the precise purpose for
28 which Plaintiff is prosecuting the action. Since no accountings

1 have been made to Plaintiff by Defendant, it has no knowledge
2 as to the amount of money due it and, accordingly, the
3 relationship of those sums to the amount allegedly due
4 Defendant by reason of Plaintiff's alleged breaches, if any.
5 Plaintiff should not be required to defend an allegation
6 regarding which only the Defendant has the requisite knowledge.

7 Moreover, the existence or lack thereof of valid set-offs
8 to Plaintiff's claim here at issue is not relevant to the
9 issuance of a preliminary injunction per se; its only relevance
10 is as it relates to the statutory standard set forth in
11 C.C.P. §526(1). While Defendant would construe that standard
12 as a showing of "reasonable probability that the Plaintiff will
13 ultimately prevail" Plaintiff would suggest a plain reading
14 of the statute. C.C.P. §526(1) provides that an injunction
15 may be granted "when it appears by the complaint that the
16 Plaintiff is entitled to the relief demanded and such relief,
17 or any part thereof, consists in restraining the act complained
18 of, either for a limited period or perpetually." The
19 license agreement at suit herein provides for the payment of
20 royalties together with an accounting thereon. The declaration
21 of Jim Pierce establishes such payments and accountings have
22 not been made pursuant thereto. Based thereon, Plaintiff
23 submits it is readily apparent that it is entitled to the
24 relief prayed for. Potential defenses and counterclaims,
25 abstract and unproven, do not alter that reality.

26 In addition, the license agreement in question specifically
27 provides for the issuance of an injunction to enforce its
28 terms. Plaintiff is unaware of any authority, nor has Defendant

1 supplied any, suggesting that such a contractual provision
2 need be ignored or that the parties to that agreement contemplated
3 such a mini-trial on the merits as Defendant now seeks to
4 bring to bear the express mandate of that provision.

5 In short, Defendant has failed to adduce sufficient
6 evidence of a bona fide defense to the instant action to
7 deny Plaintiff of the injunction necessary to protect its
8 patent license and guaranteed it by contractual agreement
9 between the parties.

10 III

11 In its third argument in opposition to the issuance of
12 a preliminary injunction, Defendant asserts that a balancing
13 of the equities discloses a disproportionate hardship upon
14 it should the injunction issue. As specific hardship Defendant
15 points to (1) the necessity that it go out of business, and
16 (2) hardship to its employees as a result of the discontinuance.

17 Plaintiff is mindful of the inconvenience and impact
18 of the injunction here sought and, accordingly, does not seek
19 such relief lightly. Nevertheless, there exists no other
20 method of preserving Plaintiff's rights until trial can be
21 had of the matter. Plaintiff submits that the Defendant can
22 not now be heard to complain when it acquired the very essence
23 of its business from Plaintiff's patents, was under an
24 obligation to pay royalties and to account therefor, ignored
25 that agreement and attempted to add terms thereto, and now
26 seeks to continue its business, using Plaintiff's invention,
27 to the absolute exclusion of Plaintiff. Defendant was surely
28 mindful of the legal consequences of blatantly ignoring the

1 terms of the licensing agreement when it continued to do so
2 despite demand for compliance.

3 A denial of the injunction, on the other hand and
4 contrary to Defendant's assertion, could be devastating to
5 Plaintiff. No proceeding of law in the years to come can
6 afford an adequate remedy for the destruction of one's
7 business; Dingley v. Buckner, 11 Cal.App.181, 183-184, 104 P.478
8 (1909); or the piracy of one's invention. Sketchley v. Lipkin,
9 et al., 99 Cal.App.2d 849, 854, 222 P.2d 927 (1950). Indeed,
10 so important are the rights guaranteed by patent that Congress
11 has expressly authorized injunctive relief to prevent the
12 violation of a right secured by a patent. 35 U.S.C.A. §283.

13 Defendant cites Keith v. Superior Court, 26 Cal.App.3d
14 521 (1972), for the proposition that this court need look to
15 the effects of the injunction on its employees. Once again,
16 with all due respect to Defendant, Plaintiff is unable to
17 glean such a holding or even such an implication from the court
18 in Keith. While such may be the rule, Defendant has cited
19 no authority which would so indicate.

20 IV

21 Defendant's fourth argument is inter-related with its
22 third and asserts, in substance, that since the benefit to
23 plaintiff of the injunction would be slight as compared to
24 the hardship on Defendant, Plaintiff should be relegated to
25 its remedy at law.

26 As noted above, however, Plaintiff's damage will be
27 severe should the injunction be denied pending trial.
28 Moreover, the only authority cited by Defendant in its assertion

1 of such a general rule applied to this case is Pacific Gas &
2 Electric v. Mirmette, 92 Cal.App.2d 401 (1952). Once again,
3 however, Mirmette is likewise inapplicable and Plaintiff is
4 unable to discern any such holding, or even implication thereof,
5 in that case.

6 v

7 Finally, Defendant argues that the notice given in the
8 instant matter under C.C.P. §527(a) was fatally insufficient.

9 The Declaration of David K. Demergian on file herein discloses
10 that, pursuant to statute, an attempt was in good faith made
11 to notify each of the respective corporation's registered
12 agent for service of process. Several calls were made to
13 locate the source which indicated the message would indeed
14 be delivered to that agent. Each recipient indicated that the
15 message would be delivered. What more would Defendant suggest
16 should have been done? Plaintiff submits that Defendant's
17 complaints would be equally as strenuous irrespective of who
18 was notified and the registered agent was constituted proper
19 notice to the corporations.

20 Defendant would make large of the fact that Mr. DeCaro
21 was the registered agent for VECTORBEAM -- the very attorney
22 who drafted the agreements here in question. Nevertheless,
23 it is not denied that he was, in fact, the registered agent.
24 Once again, who else could Plaintiff notify to comply with the
25 statutory provisions other than the registered agent?
26 Plaintiff submits that upon purchasing said corporation it
27 behooved it to designate a new agent for service of process.
28 To whom would Defendant VECTORBEAM complain if the notice had

1 instead been a summons and complaint; on whom would it have
2 blamed its default?

3 VI

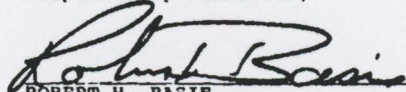
4 CONCLUSION

5 In conclusion, Plaintiff has shown itself entitled to
6 the relief sought for the protection of its exclusive patent
7 licenses and comes to this court with the "clean hands"
8 requisite to invoke equity jurisdiction.

9 WHEREFORE, Plaintiff prays its application for a preliminary
10 injunction be granted pending trial of the matter.

11 DATED: May 6, 1980

12 Respectfully submitted,

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15 ROBERT H. BASIE
16 Attorney for Plaintiff
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